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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

5 1997

In the Matter of)	
)	
Geographic Partitioning and)	
Spectrum Disaggregation by)	WT Docket No. 96-148
Commercial Mobile Radio)	
Services Licensees)	
)	
Implementation of Section)	
257 of the Communications)	GN Docket No. 96-113
Act - Elimination of Market)	
Entry Barriers)	

To: The Commission

PETITION FOR RECONSIDERATION OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION AND THE
INDEPENDENT ALLIANCE

Pursuant to Section 1.106 of the Commission's Rules,¹ the National Telephone Cooperative Association ("NTCA") and the Independent Alliance (collectively referred to hereafter as the "Petitioners") respectfully submit this Petition for Reconsideration of the Commission's Report and Order and Further Notice of Proposed Rulemaking issued in the above-captioned docket on December 20, 1996.²

NTCA is a non-profit trade association that represents independently owned and locally operated rural telephone companies. The Independent Alliance is a group of rural telephone companies that share a common interest in providing

¹/ 47 C.F.R. § 1.106.

²/ In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers: Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-148, GN Docket 96-113 (rel. Dec. 20, 1996) ("Partitioning R&O and FNPRM").

broadband PCS services to rural subscribers residing in and around their wireline service areas.

The Petitioners are interested parties in this proceeding,³ and respectfully petition for reconsideration of the recently-adopted geographic partitioning rules. In changing its rules to allow entities other than rural telcos the opportunity to acquire spectrum through partitioning, the Commission has abandoned its implementation of a direct Congressional mandate to provide opportunities for rural telcos to provide PCS services. Petitioners respectfully submit that the recent change in Commission rules not only fails to meet the specific Congressional directives of Section 309(j) of the Communications Act of 1934, as amended,⁴ but also will unfairly and adversely affect the Petitioners. In addition, the decision is arbitrary in that its abrupt departure from established policy is not explained adequately by the Commission. The Commission should, therefore, reconsider its decision and reserve partitioning rights to rural telephone companies. In support of this position, Petitioners show the following:

³/ See Comments of the National Telephone Cooperative Association and Comments of the Independent Alliance, filed Aug. 15, 1996 (in response to In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Implementation of Section 257 of the Communications Act - Elimination of Market Entry Barriers: Notice of Proposed Rulemaking, WT Docket 96-148, GN Docket No 96-113, 11 FCC Rcd 10187 ("Partitioning NPRM") (1996)).

⁴/ Communications Act of 1934, 47 U.S.C. § 151, et seq.

I. THE CONGRESSIONAL MANDATE TO PROVIDE OPPORTUNITIES FOR RURAL TELEPHONE COMPANIES WAS FULFILLED THROUGH THE COMMISSION'S PROVISION OF GEOGRAPHIC PARTITIONING.

A. The Commission Established the Necessity of Specific Measures Tailored to Each Class of Designated Entity.

The Omnibus Budget Reconciliation Act of 1993⁵ added a new Section 309(j) to the Communications Act. This section directs the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive accepted applications for initial licenses. The section also requires that the Commission

ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.⁶

(These entities have, through the course of this and related proceedings, been referred to as "designated entities."⁷)

The Commission stated at the outset of the auction process that each class of designated entities warrants policies tailored to the particular needs of that class. The Commission stated that "while the statute lists all of the enumerated groups together, it does not indicate that each group must be afforded the same type of treatment."⁸ The Commission declared its tentative conclusion that approaches tailored to meet the needs

⁵/ Pub. L. 103-66, Title VI, § 6002, 107 Stat. 312, 388.

⁶/ 47 U.S.C. § 309(j)(4)(D).

⁷/ See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Notice of Proposed Rulemaking, PP Docket No. 93-253, 8 FCC Rcd 7635, Section III-C - "Treatment of Designated Entities" (1993).

⁸/ Id. at para. 75.

of each individual group are appropriate,⁹ and subsequently established bidding credits for small entities, specified preferences for businesses owned by women and minorities,¹⁰ and geographic partitioning provisions for rural telephone companies.¹¹

B. The Commission Identified and Met Specific Goals Unique to Rural Telephone Companies When Partitioning Rules Were Established.

The Commission advanced its goal to create, for each class of designated entities, individualized measures in order to fulfill Congressional directives throughout the rulemaking process. The Commission considered, and then rejected, a plan that would have extended bidding credits to all rural telephone

⁹/ Id.

¹⁰/ The Commission in July 1995 eliminated race- and sex-based preferences that it believed raised legal uncertainties in the aftermath of the Supreme Court's decision in Adarand Constructors, Inc. v. Peña, 115 S.Ct. 2097 (1995) ("Adarand"). See, generally, In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding; Amendment of the Commission's Cellular PCS Cross-Ownership Rule; Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services: Sixth Report and Order, PP Docket No. 93-253, GN Docket Nos. 90-314 and 93-252, 11 FCC Rcd 136 (1995) ("Competitive Bidding Sixth R&O"). Provisions relating to rural telephone companies were unaffected.

¹¹/ See, generally, In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532, Section VII - "Treatment of Designated Entities" (1994) ("Competitive Bidding Fifth R&O").

companies;¹² the Commission concluded that bidding credits were tailored to, and therefore reserved for, designated entities that faced lack of access to capital.¹³ Similarly, geographic partitioning was tailored to, and reserved for, rural telcos.

The Commission determined that its partitioning plan met the statute's directive that rural telcos have the opportunity to participate in the provision of spectrum-based services.¹⁴ The Commission later reaffirmed that its partitioning plan was "narrowly tailored" to the Congressional mandate to provide rural telephone companies with an opportunity to bring PCS to rural areas.¹⁵

In December 1996, however, the Commission adopted rules that allow any party eligible to hold a PCS license to acquire partitioned spectrum.¹⁶ This expansion has in actuality obliterated the Congressionally-mandated consideration heretofore accorded to rural telcos. Whereas rural telcos had previously enjoyed what the Commission had crafted and itself declared to be

^{12/} See In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Second Report and Order, PP Docket 93-253, 9 FCC Rcd 2348, at paras. 243, 244 (1994); In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Second Memorandum Opinion and Order, PP Docket 93-253, 9 FCC Rcd 7245, at para. 110 (1994); and In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Fifth Memorandum Opinion and Order, PP Docket 93-253, 10 FCC Rcd 403, at para. 111 (1994) ("Competitive Bidding Fifth MO&O").

^{13/} Competitive Bidding Fifth MO&O at para. 111.

^{14/} Competitive Bidding Fifth R&O at para. 153.

^{15/} Competitive Bidding Fifth MO&O at para. 112.

^{16/} See Partitioning R&O and FNPRM.

a "narrowly tailored"¹⁷ solution created to meet a "directive of Congress that rural telephone companies have the opportunity to provide PCS services,"¹⁸ the new rules fail to address or meet specific Congressional concern for rural telcos. Further, the Commission's alteration of the rules after the last PCS auction had commenced reflects a complete indifference to the business plans that were constructed by the rural telcos in reliance on existing Commission policies.

II RECONSIDERATION OF THE NEW RULES IS ESSENTIAL BECAUSE THEY FAIL TO FULFILL THE COMMISSION'S CONGRESSIONAL MANDATE.

A. The Petitioners Relied on Commission Policies that Conformed to Congressional Directives by Reserving to Rural Telephone Companies Acquisition of Partitioned License Areas.

Reconsideration of the recently adopted rules is required. The Petitioners will be affected adversely if PCS licensing and implementation moves forward under the new rules.

Rural telcos relied on the Commission's assurance that opportunities for rural telcos, in accordance with Congressional directive, would be provided through partitioning. The Commission stated that

partitioning of rural areas served by rural telephone companies provides a viable opportunity for many of these designated entities who desire to offer PCS . . . rural telephone companies who cannot afford or do not desire to bid for or construct PCS systems for an entire BTA can thus acquire licenses in areas they wish to serve . . .¹⁹

¹⁷/ Competitive Bidding Fifth MO&O at para. 112.

¹⁸/ Id. at para. 109.

¹⁹/ Competitive Bidding Fifth R&O at para. 152.

Many rural telephone companies relied on the Commission's existing partitioning rules and did not participate in the auctions. The recent change in rules has altered fundamentally the foundation upon which the business plans of those rural telcos was based, and threatens to deny those designated entities the opportunity to participate meaningfully in the provision of PCS. Changing licensing rules at this time is not only contrary to principles of fundamental fairness, but also threatens the entire auction process by conflicting with a clear statutory mandate.

The Commission has previously in this docket recognized, and accommodated, business plans drawn in reliance of its rules. In the aftermath of Adarand,²⁰ the Commission chose a course of action that minimized adverse impacts on existing business relationships. The Commission recognized that women- and minority-owned C Block applicants had attracted capital and formed business relationships in reliance on Commission rules, and therefore sought to revise its auction rules to meet the Adarand standard in a manner that would be "minimally disruptive to existing business plans."²¹ Similarly, rural telcos relied on Commission rules when formulating business plans; indeed, the Commission was aware before it changed the partitioning rules that rural business courses had been charted based on partitioning policies.²² Nevertheless, the Commission has

²⁰/ See note 10, above.

²¹/ Competitive Bidding Sixth R&O at para. 8.

²²/ See Partitioning R&O and FNPRM at paras. 10, 16.

offered no explanation why, particularly where no threat of legal or Constitutional challenge is at stake, the plans of rural designated entities did not warrant consideration equivalent to that accorded women- and minority-owned C Block applicants.

The Commission has offered that "rural telcos are able to take advantage of the special provision for small businesses we designed in our auction rules to obtain licenses in the entrepreneur block auctions,"²³ suggesting that the opportunity for rural telcos to participate in PCS auctions existed on the date the new rules were adopted. However, the new rules were adopted fully 20 weeks after the deadline for participation in the last broadband PCS auction had passed.²⁴ Rural telephone companies were, therefore, unable to participate in any auctions after the rules changed. The sweeping change in policy disregards, and threatens to devastate, rural telcos and the business plans they crafted in reliance upon Commission policies, and eviscerates implementation of the Congressional mandate.

B. The New Rules Fail to Fulfill the Congressional Mandate with Which the Commission Has Been Charged.

The Commission further explains that its new rules will facilitate the provision of PCS in rural areas.²⁵ Although this goal is laudable, if attained, it does not fulfill the statutory mandate. Congress directed the Commission to provide specific

²³/ Partitioning R&O and FNPRM at para. 15 (emphasis added).

²⁴/ The new rules were adopted on December 13, and released on December 20, 1996; the deadline for registering for the last of the Commission's PCS auctions was July 31, 1996. See Partitioning R&O and FNPRM, and Public Notice, DA 96-1064 (Jul. 1, 1996).

²⁵/ Partitioning R&O and FNPRM at para. 14.

opportunities for rural telcos to participate in the provision of spectrum-based services. The Commission stated explicitly that geographic partitioning reserved to rural telephone companies was its sole fulfillment of its Congressional mandate:

We have decided not to adopt any other auction-related measures specifically for rural telephone companies in this Order. We believe that the partitioning plan we are adopting will provide rural telephone companies with substantial capabilities to acquire licenses to provide broadband PCS . . .²⁶

The new rules, however, provide no mechanism that promotes the participation of rural telcos in the provision of PCS. The Commission neither addresses specifically, nor explains the absence of, specific provisions for rural telcos. Therefore, Petitioners respectfully submit that the objective of Congress has not been met, and that the rules must be reconsidered.

III CONCLUSION

The Commission initially established rules that incorporated provisions designed to ensure that the Congressional mandate for each of the designated entities was fulfilled. Subsequently, new rules that strip rural telephone companies of Congressionally-mandated consideration were imposed. The Petitioners respectfully urge reconsideration of these new rules, which ignore without foundation or support prior Commission factual and legal findings, and result in the establishment of new policy that ignores the Congressional mandate to provide rural telcos with specific opportunities to participate in the provision of PCS services. The prior rules that reserved partitioning to rural telcos should be reinstated. In the alternative, the

²⁶/ Competitive Bidding Fifth R&O at para. 153.

Commission should adopt the proposals on the record which address both expanded partitioning rights and the mandate of Section 309(j) to provide opportunities for rural telcos.²⁷

Respectfully submitted,
NATIONAL TELEPHONE COOPERATIVE
ASSOCIATION and the
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^{27/} See, generally, Comments of NTCA and Comments of the Independent Alliance. These proposals would cure the Commission's failure to describe and identify in its Initial Regulatory Flexibility Analysis (IRFA) significant alternatives to the newly adopted rules. Indeed, the Commission's goal, to eliminate entry barriers for small businesses (see Partitioning NPRM at para. 1), is not met by new rules that allow any size entity to acquire partitioned spectrum, and which could result in the prompt suppression of small businesses by larger entities seeking entry to the marketplace.

CERTIFICATE OF SERVICE

I, Shelley M. Bryce, of Kraskin & Lesse, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Petition for Reconsideration of the National Telephone Cooperative Association and the Independent Alliance" was served on this 5th day of February, 1997, by hand delivery, to the following parties:



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